No. 84-1044

In The
Supreme Court of the United States
October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From The Supreme Court Of California

BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION

CONSTANCE E. BROOKS
K. PRESTON OADE, JR.*
CASEY SHPALL

MOUNTAIN STATES LEGAL FOUNDATION
1200 Lincoln Street, Suite 600
Denver, Colorado 80203
(303) 861-0244

* Counsel of Record

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With the written consent of all parties, Mountain States Legal Foundation (MSLF or Foundation) respectfully submits this brief as *amicus curiae* in support of appellant, Pacific Gas & Electric Company (PG&E).[1]

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[1]MSLF has filed the written consents of all parties with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, membership, public interest legal foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system. The Foundation seeks to protect the interests of its members and those of the public from overly intrusive, unnecessary, and costly governmental regulation.

The Foundation is strongly committed to limiting the role of public utility commissions to their traditional functions of setting reasonable rates and assuring adequate services. The Foundation has been a party in numerous public utility proceedings in order to confine the actions of utility commissions to only those authorized by law.[2]

The instant case is of particular importance to MSLF and its members because the Foundation represents the

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[2]MSLF has participated in many cases in which utility commissions have tried to expand their powers. *See, e.g., Mountain States Legal Foundation v. New Mexico State Corporation Commission*, 687 P.2d 92 (N.M. 1984); *Montana Power Co. v. Public Service Commission*, 671 P.2d 604 (Mont. 1983); *Mountain States Legal Foundation v. Utah Public Service Commission*, 636 P.2d 1047 (Utah 1981); *Idaho Public Utilities Commission Consideration of Essential Needs Rates*, No. P-300-16 (Idaho Public Utilities Commission Sept. 1, 1981); *Mountain States Telephone & Telegraph Co. v. Public Service Commission*, 634 P.2d 181 (Mont. 1981); *Mountain Fuel Supply Co. v. Utah Committee of Consumer Services*, 595 P.2d 871 (Utah 1979), *cert. denied*, 444 U.S. 1014 (1980); *Mountain States Legal Foundation v. Colorado Public Utilities Commission*, 590 P.2d 1945 (Colo. 1979); *Becker Industries v. Idaho Public Utilities Commission*, No. 13267 (Idaho Supreme Ct., stipulated dismissal Aug. 17, 1979); and *In re Utah Public Service Commission Generic Ratemaking Proceedings*, No. 77-999-09 (Public Service Commission of Utah Feb. 2, 1979).

Utility Shareholder Association of Nevada, Inc. before the Public Service Commission of Nevada on issues identical to those pending before this Court.[3] The Foundation believes that the expansion of utility commissions' powers to include the authority to give third parties access to utility billing envelopes infringes upon cherished first amendment freedoms and adversely affects the public interest.

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STATEMENT OF THE CASE

On December 20, 1983, the Public Utilities Commission of California (CPUC or Commission) ordered PG&E to give a consumer group, Toward Utility Rate Normalization (TURN), access to the "extra" space[4] in the utility's billing envelope four times a year for two years. CPUC Decision No. 83-12-047 at A-32. This order was based on a CPUC finding, in an earlier proceeding, that the "extra" space in PG&E's billing envelope belonged to

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[3]On February 20, 1985, the Utility Shareholder Association of Nevada, Inc. was granted intervention by the Public Service Commission of Nevada in *In re Investigation of Commission Jurisdiction Over Extra Space In Utility Billing Envelopes*, Docket No. 84-1129.

[4]The CPUC defined "extra space as the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other material up to such total envelope weight as would not result in any additional postage cost." CPUC Decision No. 83-12-047 at A-3. (All page references to CPUC decisions are keyed to the Appendix To The Jurisdictional Statement of Appellant Pacific Gas & Electric Company.)

the ratepayers. CPUC Decision No. 93887 at A-72. On May 2, 1984, the CPUC issued Decision No. 84-05-039, modifying Decision No. 83-12-047 and denying all requests for a new hearing. PG&E's request for review to the Supreme Court of California was also denied without comment on October 4, 1984.[5]

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INTRODUCTION AND SUMMARY OF ARGUMENT

The very nature of regulatory commissions, including public utility commissions, dictates that they will seek to expand their regulatory activities. As a result, attempted regulation often exceeds the constitutional and statutory limits placed on commissions. This case presents a unique opportunity for the Court to contain the power of public utility commissions when they tamper with protected first amendment rights or encroach into areas that are properly the prerogative of utility management.

This brief *amicus curiae* will demonstrate to the Court some of the many constitutional infirmities created by the CPUC's decision to expropriate the "extra" space in utility billing envelopes for third-parties' ostensible benefit. The Commission's decision not only infringes on the first amendment rights of PG&E, but also on the rights of competing consumer groups desiring to use the "extra" space. The first amendment prohibits government action that enhances the voice of some at the expense of others. This Court is, therefore, compelled to reverse the decision below.

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[5]For a fuller development of the facts, see PG&E's Jurisdictional Statement filed with the Court.

ARGUMENT

I. The CPUC Cannot Allocate "Extra" Envelope Space Without Infringing On Competing Consumer Groups' First Amendment Rights.

The CPUC has conceded that the billing envelope itself is PG&E's property; it is only the "extra" space in the envelope that allegedly belongs to ratepayers. CPUC Decision No. 83-12-047 at A-2 and A-3. MSLF contends that both the billing envelope and the space within are the property of the utility. However, leaving aside the issue of the ownership of the "extra" space, there are still significant infringements of competing consumer groups' first amendment rights when the utility's billing envelope is opened up to them. The CPUC's decision not only fails to address these issues, but the operation of its decision will inevitably interfere with first amendment freedoms.

Commissioner Calvo, in his dissenting opinion to CPUC Decision No. 84-05-039 at A-56, noted:

> As to rights, TURN certainly cannot lay claim to any greater rights than any other ratepayer or consumer group that might request access to the billing envelope. *Thus, I am concerned that this Commission not place itself in a predicament where it will be called upon to resolve disputes as to whom or when or how often a multitude of competing groups or ratepayers should be granted access to the billing envelope.* And, of course, the Supreme Court has implied that some rights are held by the utility should it desire to use the extra space for its purposes. *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530 (1980) (emphasis added).

The Commissioner's concerns are well taken. In the proceedings below, the CPUC was not confronted with the task of choosing between competing ratepayer and consumer groups, all vying for the "extra" envelope space, because TURN was the only group that had requested access. However, the CPUC is squarely faced with this problem in proceedings now pending before it regarding Pacific Telephone & Telegraph Company's (Pacific Bell) "extra" envelope space.[6]

The Pacific Bell proceedings bring into sharp focus the problems encountered when a governmental entity becomes the arbiter of who will speak and who will not. Application of the CPUC's ruling to open up the "extra" envelope space mandates that the Commission judge which third-party messages deserve to be published and which do not. Whenever a governmental body, such as the CPUC, dictates which messages are worthy of communicating and which are not, the first amendment is violated.

The Commission itself expressed doubts about the constitutionality of acting:

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[6]There are three different groups clamoring for Pacific Bell's "extra" space. The first group, collectively referred to as TeleCUB, consists of California Public Interest Research Group, Consumers Union, Common Cause of California and Consumer Federation of California. CPUC Case No. 83-08-04. Under TeleCUB's proposal, other ratepayer access would be forbidden. The second group, TURN, has requested access to Pacific Bell's billing envelope in an application similar to the one it filed in the present case. CPUC Case No. 83-12-03. The TeleCUB and TURN proceedings have been consolidated for hearing. The third request for the "extra" space was made by Telephone Users Federation. CPUC Case No. 84-02-01.

> [T]o ban the *Progress* [PG&E's publication] entirely if we simply intend to use that "extra" space for conservation messages, or other speech, composed by the Commission, interested public participants such as TURN or other parties. *This might simply be a substitution of one form of speech for another, a preference for governmentally sponsored or governmentally allowed speech. Such a preference could be more dangerous than the evil which TURN seeks to correct.* We believe it might be invalidated for the reasons the content-based regulation (a ban on pronuclear speech) was invalidated in *Consolidated Edison.*

CPUC Decision No. 93887 at A-69 and A-70 (emphasis added).[7]

Whatever criteria the CPUC adopts, the Commission must necessarily make choices between competing consumer groups, and those choices must focus on the identity of the proposed speakers or the content of their messages. The CPUC has already discriminated in this manner against PG&E by determining that TURN's messages were more meritorious, at least four times during the year, than those of PG&E. Each time the Commission grants access to PG&E's envelope to one or more com-

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[7]The CPUC modified its ruling to avoid the appearance of an outright ban on PG&E's use of the "extra" envelope space during the months that TURN had access. CPUC Decision No. 84-05-039 at A-53(30) (v), *modifying* CPUC Decision No. 83-12-047 at A-32(5) (a). Nevertheless, PG&E will be effectively precluded from using the "extra" space if TURN uses all the space for its own messages.

peting consumer groups, it must again discriminate. These very acts of selection violate the first amendment.

II. The CPUC's Decision Violates The Established Law Of This Court.

CPUC's assumption of the job of allocating the "extra" envelope space ignores the first amendment's prohibitions against governmental discrimination between potential speakers and violates the established law of this Court. Assessing the relative merits of PG&E's and consumer groups' speech is an improper role for the CPUC.

The Supreme Court has recognized that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 777 (1978). "It is a cardinal principle of the First Amendment that 'government has no power to restrict expression because of its message, its ideas, its subject matter or its content.'" *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 776 (1976) (Stewart, J., concurring). In other words, government has a "paramount obligation of neutrality" toward both the identity of the speakers and the content of their speech. *Young v. American Mini Theaters, Inc.,* 427 U.S. 50, 70 (1976) (Stevens, J., plurality).

In *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976), this Court emphasized that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." Thus, this Court

recognizes that it is antithetical to the first amendment and to government's role in a free society to suppress the speech of one group in favor of another. Indeed, one of the express bases for this Court's ruling in *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 87 (1980), was that there was "no danger of governmental discrimination for or against a particular message."

In this case, however, the CPUC has placed itself in a position where it must discriminate between competing consumer groups in order to carry out its ruling. The first amendment will not tolerate such a result.

III. The CPUC's Justification For Infringing Upon PG&E's First Amendment Rights Fails The Constitutional Test.

For commercial speech to be protected it must "accurately inform the public about lawful activity." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557, 563 (1980). Whether PG&E's speech is considered commercial or political, there is no evidence in the record that the utility's publication misinformed or misled the ratepayers. Rather, it was the CPUC's desire "to use the economic value of the extra space more efficiently for the ratepayers' benefit" that led the Commission to regulate the space in PG&E's billing envelope. CPUC Decision No. 83-12-047 at A-21. While the CPUC's decision may arguably result in a more informed ratepaying public, the Commission has effectively banned PG&E from using a critical medium, i.e., its own billing envelope, for speech purposes.

The CPUC's rationale for such a drastic measure pales under first amendment light. When governmental regulation is based on the content of speech, it must be scrutinized more carefully to ensure that a communication is not prohibited "merely because public officials disapprove the speaker's views." *Niemotko v. Maryland,* 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result). The CPUC's decision cannot withstand such exacting scrutiny. The CPUC's ruling can be sustained only upon a showing "that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. of New York v. Public Service Commission,* 447 U.S. 530, 540 (1980). *See also, Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 565-66 (1980) (government regulation of speech must be narrowly tailored).

The CPUC, however, has totally failed to consider the numerous and less restrictive alternatives available to encourage ratepayer participation in commission proceedings or to identify a sufficiently compelling state interest.[8] In addition, the CPUC has failed to grapple with the numerous free speech problems created when a governmental entity takes it upon itself to pick and choose among competing consumer applicants for the "extra" space. Such cavalier treatment by the CPUC of PG&E's protected first amendment freedoms cannot be permitted to continue.

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[8]These various alternatives have been discussed in PG&E's Jurisdictional Statement at 24-25 and will not be reiterated here.

CONCLUSION

The CPUC's ruling that the "extra" space in PG&E's billing envelope be turned over to consumer groups does not withstand first amendment scrutiny. The ruling places the CPUC in the untenable position of choosing which competing consumer groups gain access to the utility's billing envelopes and which are foreclosed, based upon the identity of the group and the content of the speech. In addition, the CPUC has failed to provide adequate justification for the resulting ban on PG&E's speech.

For these reasons, the CPUC's ruling must be invalidated as violative of the first amendment.

Dated this 29th day of May, 1985.

Respectfully submitted,

CONSTANCE E. BROOKS
K. PRESTON OADE, JR.*
CASEY SHPALL
MOUNTAIN STATES LEGAL FOUNDATION
1200 Lincoln Street, Suite 600
Denver, Colorado 80203
(303) 861-0244

* Counsel of Record

INTEREST OF THE *AMICI CURIAE*, NATIONAL FUEL, *ET AL.*

National Fuel Gas Distribution Corporation, The Brooklyn Union Gas Company, Central Hudson Gas & Electric Corporation, and Rochester Gas and Electric Corporation are privately-owned public utility companies which provide service to a total of nearly two million gas customers and more than one-half million electric customers in the State of New York. All four companies are subject to the jurisdiction of the New York State Public Service Commission ("PSC").

A PSC-mandated billing envelope access scheme substantially similar to that imposed by the appellee, California Public Utilities Commission ("PUC" or "Commission"), on the appellant, Pacific Gas and Electric Company ("PGandE" or "Company"), in the instant case was struck down by the New York Supreme Court.

On May 14, 1984, the PSC issued its *Statement of Policy Governing the Access of Intervenor Organizations to the Extra Space in the Utilities' Billing Envelopes* (Case 28655 - "Proceeding on Motion of the Commission to Examine Ratepayer Access to Utility Billing Envelopes and the Concept of a Citizens' Utility Board")[1] in which it required New York's major privately-owned gas, electric and telephone utilities to provide access to their billing envelopes to consumer organizations. National Fuel, *et al.*, subsequently applied for rehearing on the PSC's *Statement of Policy,* and that application was denied on November 14, 1984. On December 13, 1984, National Fuel, *et al.*, commenced an action in Supreme Court, Albany County, New York, for a declaration that, *inter alia,* the *Statement of Policy* violated their

[1] The PSC's *Statement of Policy* is reproduced in the Appendix to PGandE's Jurisdictional Statement as Appendix I, at pages 111a-41a.

rights to free speech and association protected by the First and Fourteenth Amendments to the United States Constitution and deprived them of their property (*i.e.*, the billing envelope) without due process of law or just compensation, in contravention of the Fifth and Fourteenth Amendments. The case was argued together with a similar action[2] before the New York Supreme Court, Special Term, on January 4, 1985. On April 10, 1985, the court issued a decision[3] concluding that the *Statement of Policy* violated the utilities' rights under the First and Fourteenth Amendments. *Consolidated Edison Co. v. Public Service Comm'n,* ____ Misc. 2d ____ (Sup. Ct. Albany Co. April 10, 1985, Index No. 10762-84). Specifically, the New York Supreme Court determined that the PSC violated the utilities' right to refrain from speaking and that it impermissibly engaged in the regulation of speech, not only by determining what group or groups would have access to billing envelopes, but also by deciding whether the content of such enclosures is objectionable. The PSC and the intervenors-respondents have appealed to the Appellate Division of the New York Supreme Court. At this time, the appeal has not been briefed or argued.[4]

Although there are some differences between the New York and California billing envelope access schemes, it is clear that a decision by this Court as to the First Amendment issues in the

[2] Brought by three other privately-owned New York utilities, Consolidated Edison Company of New York, Inc., Continental Telephone Company of New York, Inc., and New York State Electric & Gas Corporation.

[3] The April 10, 1985 decision amended the court's initial decision issued March 19, 1985.

[4] A stay of the New York Supreme Court's Judgment and Order nullifying the forced access requirement of the *Statement of Policy* was automatically imposed by statute when the PSC appealed. To preserve the status quo pending the appeal, the utilities moved to vacate the stay. When this brief was printed the Appellate Division, Third Department, had not yet rendered a decision on the motion.

instant case will have an important impact on the litigation currently pending in New York. Accordingly, National Fuel, *et al.*, have an important stake in the outcome of this case.

Our purpose in this brief is not to repeat the arguments of PGandE, but rather to focus upon a limited number of points which we believe warrant particular attention.

We have obtained the written consent of each party to file this brief and have filed such consents with the Clerk of the Court.

SUMMARY OF ARGUMENT

Despite the fact that it is a regulated utility corporation, PGandE is entitled to the protections afforded by the First Amendment for its freedom of expression. The envelopes in which PGandE sends its bills for service and other communications to customers are the property of PGandE, not the Company's ratepayers, not Toward Utility Rate Normalization ("TURN"), and not the State of California. By ordering PGandE to include in its envelopes the messages of TURN, an organization hostile to the interests of PGandE, the PUC unconstitutionally restricts PGandE's right to use its property to communicate with customers and compels PGandE to support the communication of, and become associated with, messages to which it is opposed. The PUC has not met — nor could it meet — its burden of demonstrating that the foregoing infringement of PGandE's First Amendment rights is justified by a compelling state interest. Even assuming, *arguendo,* that such an interest had been, or could be, shown, the PUC has not demonstrated that the infringement of PGandE's rights is narrowly tailored to serve that interest and that the Commission's promotion of such interest is ideologically neutral.

In short, as will be demonstrated in more detail in this brief, the PUC's forced-access requirement restricts PGandE's First Amendment rights and fails to meet the applicable test for a valid governmental limitation on such rights.

ARGUMENT

POINT I

PUBLIC UTILITY CORPORATIONS ARE ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT.

Although PGandE is a public utility whose business of providing gas and electric service to customers is subject to extensive regulation by the PUC, the Company is entitled to the freedom of expression guaranteed by the First Amendment. *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530 (1980); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, *reh'g denied,* 438 U.S. 907 (1978). This Court's decisions in *Consolidated Edison* and *First National Bank* also make clear that the protection afforded a privately-owned public utility corporation is no less comprehensive than that afforded other individuals and organizations. *Consolidated Edison, supra,* at 533; *First National Bank, supra,* at 777.

POINT II

THE BILLING ENVELOPE AND THE SPACE INSIDE IT ARE PGandE'S PROPERTY.

The PUC's assertion, that it may, consistent with the First Amendment, compel the inclusion of TURN's messages in PGandE's billing envelopes, is founded primarily upon the notion that such a requirement does not interfere with the use of any utility-owned property for communications purposes. Instead, according to the Commission, this requirement merely affords

ratepayers an opportunity to benefit from the utilization of property (the "extra space" in the billing envelope) which they purportedly purchased as a consequence of their payment for gas and electric service. Dec. No. 83-12-047, App. to Juris. Statement 2a-3a. This foundation to the Commission's argument is as infirm as it is novel.

Although PGandE's property is used in the rendition of service to the public, and, in most cases, the cost of that property ultimately is borne by customers through payments for service, those customers do not thereby acquire an interest in any of PGandE's property. In *Board of Public Utility Comm'rs v. New York Telephone Co.*, 271 U.S. 23, 32 (1926), the Court stated this fundamental principle succinctly:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock.

The State of California, while permitted to regulate PGandE's rendition of public service "with a view to enforcing reasonable rates and charges, . . . is not the owner of the property of public utility companies, and is not clothed with general power of management incident to ownership." *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm'n,* 262 U.S. 276, 289 (1923). In *Consolidated Edison Co. v. Public Service Comm'n, supra,* the Court specifically acknowledged the utility's ownership of billing envelopes, referring to Consolidated Edison's efforts "to utilize *its own billing envelopes"* to communicate with its customers.[5] 447 U.S. at 540 (emphasis added).

The PUC's effort to separate "extra space" from PGandE's privately-owned billing envelope[6] and to redefine that space as "ratepayer property" (Dec. No. 83-12-047, App. to Juris. Statement 3a) is an obvious attempt to circumvent this Court's decision in *Consolidated Edison, supra.* According to the Commission, by so defining the ownership of the "extra space," it was "not so much describing a traditional property right as an equity right." Dec. No. 83-12-047, App. to Juris. Statement 4a. The rationale giving rise to this "equity right" is that, by virtue of current postal regulations which require the sender of an envelope to pay for a full ounce of postage even if the envelope and contents weigh considerably less, ratepayers have effectively paid for some empty space in the envelope and are entitled to benefit from use of that space. *Ibid.*

In addition to conflicting directly with this Court's precedents on the subject of ownership and management of utility property (*see, e.g., Board of Public Utility Comm'rs, supra,* 271 U.S. at 32), the PUC's proposed bifurcation of ownership, separating ti-

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[5] In so stating, the Court clearly rejected the dissent's suggestion that the billing envelope somehow stood on a different footing because it had been purchased by the utility with funds supplied by customers' payments for service. *Consolidated Edison, supra,* at 555 (Blackmun, J., dissenting).

[6] The PUC, by its own acknowledgement, "did not adopt the idea that the envelope itself is ratepayer property, as TURN suggested." Dec. No. 83-12-047, App. to Juris. Statement 2a-3a.

tle to the envelope — and, apparently, some of the space inside[7] — from title to the empty or "extra space" therein, is absurd on its face.[8]

To view an envelope as being somehow separate from the space inside is contrary to common sense. An envelope exists for the purpose of mailing written or printed matter. Use of the space within the envelope is use of the envelope. The two are inseparable. To suggest that an insert placed in an envelope does not "use" the envelope is the equivalent of asserting that one who walks into a room or stores material therein does not "use" the room.

Similarly, employing the same logic that the PUC has applied to billing envelopes, one would conclude that ratepayers are entitled to use the utility's office space, vehicles and computers whenever the utility is not doing so. Indeed, because the utility's First Amendment rights might not be implicated as a result of compelled third-party use of such equipment and facilities, the basis for such compulsion, if valid at all, would appear to be much stronger than in the instant case where the use of billing envelopes so clearly implicates freedom of expression. The result is contrary to common sense; but it is exactly where the PUC's reasoning leads.

Even the PUC and TURN might be troubled by the proposition that persons who purchase goods and services from a private, non-utility corporation are thereby entitled to enclose their

[7] *I.e.*, the portion which is currently physically occupied by PGandE's enclosures, including the bill, but excluding *Progress*.

[8] The PUC's fall-back position, that its conclusions regarding ownership of the space within PGandE's billing envelopes are not properly subject to review in this appeal (PUC Mot. to Dismiss 8-9; *cf.* Dec. No. 83-12-047, App. to Juris. Statement 6a), was adequately addressed by PGandE in its Brief in Opposition to Motions to Dismiss (at 1, n.1) and we need not elaborate here.

messages in the corporation's billing envelopes.[9] But the Commission's rationale for finding an "equity right" in the "extra space" (Dec. No. 83-12-047, App. to Juris. Statement 4a) applies with equal force to non-utility enterprises. If customers of a utility somehow acquire an "equity right" in envelope space by virtue of their payment for utility service, then there is absolutely no reason why customers of a non-utility business do not acquire an identical "equity right" to the space in billing envelopes used by the latter firms. This result, too, is absurd; but, once again, it is where the PUC's approach inexorably leads.

The Commission's attempt to "redefine" PGandE's property interest in its billing envelopes in such a way as to preclude the Company from arguing that it is being unconstitutionally restricted in the use of its property for the exercise of its freedom of expression represents a cynical, result-oriented abuse of regulatory authority. If the Commission were to succeed in so blithely redefining property interests to suit the political climate of the moment, no property belonging to any commercial enterprise — from the smallest sole proprietorship to the largest Fortune 500 company — would be safe from such abuse.

[9] *Cf. Consolidated Edison, supra,* 447 U.S. at 552-53 (Blackmun, J., dissenting):

> [A] state law requiring a person to permit the utility to include its insert in the envelope with that person's private letters clearly would infringe upon the letterwriter's First and Fourteenth Amendment rights.

POINT III

FORCED ACCESS BY TURN TO PGandE's BILLING ENVELOPES INFRINGES PGandE'S FREEDOM OF EXPRESSION IN AT LEAST TWO SUBSTANTIAL WAYS.

The Commission's decisions deprive PGandE of its right to express itself, first, by limiting the Company's ability to use the envelope space occupied by TURN for the communication of PGandE's own messages, and second, by forcing the Company to carry messages with which it disagrees. Neither form of infringement has been, or can be, justified.

A. The PUC Precludes PGandE From Including Communications Of Its Choosing In The Billing Envelope.

During four months of every year — to be selected by TURN — TURN is not only afforded access to PGandE's billing envelopes, but is endowed with unfettered discretion to entirely displace the Company's communications.[10] *See* Dec. No. 84-05-039, App. to Juris. Statement 51a. The PUC thus places PGandE's ability to communicate effectively with its customers at the mercy — and caprice — of TURN for at least one-third of the year. As Commissioner Bagley stated succinctly in his dissent from Decision No. 84-05-039,

> . . . TURN can determine, solely by its choice of paper weight, whether or not and if so how much material may be inserted in the envelope by [PGandE's] management on behalf of the shareholder. . . . Under this order we have the unseemly situation where government, by its order and without specifying any criteria whatsoever, allows one party to proscribe the free speech of the other. That, compared to government proscription, is deprivation squared.

App. to Juris. Statement 59a-60a (citation omitted).

[10] In addition to displacement by "using up" the first ounce of postage, the physical capacity of the envelope itself may be reached.

As will be made clear in Point IV, *infra,* the PUC has failed to make the constitutionally required showing to justify the foregoing restriction on PGandE's freedom to communicate.

B. The PUC Compels PGandE To Speak And To Support, And Become Associated With, The Speech Of TURN.

In addition to the direct preclusive impact on PGandE's ability to include its communications in the billing envelope, as described above, the PUC's decisions violate PGandE's constitutionally protected right to refrain from speaking and providing compelled support for the speech of TURN. The right to speak and the equally protected right to refrain from speaking "are complementary components of the broader concept of 'individual freedom of mind.' " *Wooley v. Maynard,* 430 U.S. 705, 714 (1977) (*quoting West Virginia Board of Education v. Barnette,* 319 U.S. 624, 637 (1943)). Together, these rights protect a person's interest in presenting or withholding his views whenever, wherever and however he desires.[11] The PUC's decisions violate this freedom by placing the messages of TURN — a non-democratically constituted organization with a history of opposition to PGandE's interests and views (Dec. No. 83-12-047, App. to Juris. Statement 14a-15a) — in billing envelopes identified as being those of PGandE and, to the extent there is any space left in those envelopes, in the very same envelopes with PGandE's own

[11] With obvious and narrow exceptions designed to serve overriding governmental interests. *Miller v. California,* 413 U.S. 15, *reh'g denied,* 414 U.S. 818 (1973) (obscene speech not protected by First Amendment); *Brandenburg v. Ohio,* 395 U.S. 444 (1969) (state may proscribe advocacy directed to inciting imminent lawless action and likely to produce such action); *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942) (punishment of utterance of "fighting words" not prohibited by Constitution).

messages. It is not mere speculation to suggest that a communications medium, which has been identified for more than 60 years as an exclusive vehicle for expressing PGandE's views on important matters,[12] will lose that characteristic and hence its effectiveness. TURN inserts will undoubtedly attack PGandE's positions stated in *Progress* and elsewhere, and force PGandE either to respond to some or all of TURN's statements or to run the risk that silence will be regarded by recipients as acquiescence.[13] The consequence of the PUC's decisions is to compel speech and association against PGandE's wishes, and thereby to abrogate the Company's First Amendment rights.

This Court has long held that the State cannot compel a person to convey a message with which he disagrees. ***West Virginia Board of Education v. Barnette, supra*** (compulsory recitation of pledge of allegiance). This right to remain silent extends to situations in which a person is neither directly prohibited from expressing his own views in the first instance nor precluded from

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[12] The fact that the PUC has required PGandE to convey certain information which, by the Commission's own description (PUC Mot. to Dismiss 11), is service-related has no bearing on the issues in this appeal. In the first place, what is at issue is not the PUC's authority to require PGandE to convey (or even physically enclose) the Commission's messages in billing envelopes, but rather whether the PUC can constitutionally order PGandE to carry the messages of a non-governmental entity (TURN). In the second place, regardless of the source or nature of the messages PGandE may have carried in the past, such action cannot be construed as a waiver of First Amendment protections. Acquiescence in past violations of a First Amendment right does not operate to waive that freedom. "Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, [the Court is] unwilling to find waiver in circumstances which fall short of being clear and compelling." *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 145, *reh'g denied,* 389 U.S. 889 (1967).

[13] As discussed at note 22, *infra,* the Court has recognized the particular difficulties that arise where one's property is used as a forum to attack that owner.

responding to the message he is forced to carry. ***Miami Herald Publishing Co. v. Tornillo,*** 418 U.S. 241, 256 (1974) (requirement that newspaper print candidate's reply to editorial endorsement). Likewise, as the *Miami Herald* case makes clear, the right to remain silent is violated even if the specific message to be carried is not dictated by the government.

The framework for evaluating the constitutionality of a State compulsion to carry a message was enunciated by the Court in ***Wooley v. Maynard, supra.*** The principles stated therein are equally applicable to the facts of this case.

In *Wooley,* the appellees argued that New Hampshire's requirement that their vehicle bear license plates with the State motto "Live Free or Die" was repugnant to their moral, religious and political beliefs and thus they could not, consistent with the First Amendment, be forced to display the motto. This Court formulated the question before it as

> whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by ***displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.***

430 U.S. at 713 (emphasis added). In holding the statute unconstitutional, the Court stated that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all" (*id.* at 714), and that "[t]he First Amendment protects the rights of individuals . . . to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." *Id.* at 715. The Court found no countervailing interest on the part of the State sufficient to justify the infringement of the appellees' First Amendment rights. *Id.* at 716-17.

The *Wooley* case is closely analogous to the instant situation in which PGandE is being compelled by the PUC to carry TURN's

messages in its privately-owned billing envelopes for the purpose of having them distributed to and read by the public. Indeed, the nature of the State compulsion is even more egregious in this case than it was in *Wooley*. TURN's messages are to be placed right in PGandE's billing envelope, distracting from, if not displacing altogether, PGandE's messages. Unlike the brief motto on New Hampshire license plates, TURN's messages will, in addition to affirmatively espousing that entity's views,[14] attack, either explicitly or by implication, PGandE's views. There is, of course, an even greater danger that the recipient of a TURN message included in a PGandE billing envelope will assume that the message is either endorsed by PGandE or at least acquiesced in by the Company. Common sense tells us that such a likelihood far exceeds the likelihood that the act of affixing a license plate to a vehicle will be misconstrued by the public as agreement with the motto appearing on the plate. Thus, there can be no real doubt that PGandE's right of expression is infringed by the PUC's envelope access scheme.

POINT IV

THE PUC'S INFRINGEMENT OF PGandE'S FREEDOM OF EXPRESSION FAILS TO PASS CONSTITUTIONAL MUSTER.

As articulated in *Wooley*, in order to justify its requirement that PGandE carry TURN's messages, the Commission must demonstrate that *each* of the following criteria is satisfied: (1) the State's interest is sufficiently compelling to warrant the action; (2) the State's objective cannot be achieved by narrower means; and (3) the purpose of the restriction is ideologically neutral.

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[14] As the Court's decision in *Miami Herald Publishing Co. v. Tornillo, supra,* suggests, the fact that TURN will espouse its own views and not a specific message prescribed by the State of California does not diminish the infringement of PGandE's constitutional rights. *See* pp. 20-21, *infra.*

Wooley, supra, at 716-17. As in all cases involving limitations on First Amendment rights, the burden of proof as to each element of the test is on the State. *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 786; *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 560 (1975); *Freedman v. Maryland,* 380 U.S. 51, 58 (1965); *Speiser v. Randall,* 357 U.S. 513, 528-29, *reh'g denied,* 358 U.S. 860 (1958). The PUC has not met its burden — nor could it — on any of the foregoing criteria.

A. The PUC Has Not Demonstrated A Compelling Interest In Mandating Access By TURN To PGandE's Billing Envelopes.

This Court has made clear that encroachment upon First Amendment freedoms "cannot be justified upon a mere showing of a legitimate state interest." *Kusper v. Pontikes,* 414 U.S. 51, 58 (1973). Such justification requires a demonstration of a paramount state interest. *Elrod v. Burns,* 427 U.S. 347, 362 (1976). The PUC has not made — nor can it make — such a showing.

The PUC has described, in various ways, the interests intended to be served by TURN's access to PGandE's billing envelopes. The eight nominally distinct interests listed at pages 17-18 of the Commission's Motion to Dismiss boil down to two basic categories: (a) promoting consumer representation and the expression of additional views in PUC proceedings, and (b) preventing PGandE's "misappropriation" of ratepayer property. The Commission, however, has not demonstrated that these interests are sufficiently compelling to require that PGandE's freedom of expression be subordinated thereto.

The Commission's suggestion that, unless it obtains access to PGandE's billing envelopes, TURN "cannot participate in all the regulatory proceedings of PG&E it might otherwise participate in without significant financial hardship" (Dec. No. 83-12-047, App. to Juris. Statement 16a), overlooks the established princi-